Supreme Court, U.S.
FILED
OCT 11 1995

No. 95-230

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOYCE L. WALMER, PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Petitioner, an Army officer, was honorably discharged based upon her stipulation that she had committed homosexual acts, including acts punishable as criminal sodomy under the Uniform Code of Military Justice (10 U.S.C. 925), in violation of the Army's former regulation governing homosexual acts. The question presented is whether, in seeking a preliminary injunction to prevent her discharge, petitioner failed to demonstrate a likelihood of success on her claim that her discharge violated the equal protection guarantee of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Ben-Shalom v. *Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990)	6
Brotherhood of Locomotive Firemen v. *Bangor & Aroostock R.R.*, 389 U.S. 327 (1967)	8
City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)	7
Dronenburg v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984)	6
Goldman v. *Weinberger*, 475 U.S. 503 (1986)	8
Heller v. *Doe*, 113 S. Ct. 2637 (1993)	4-5, 7
Meinhold v. *Department of Defense*, 34 F.3d 1469 (9th Cir. 1994)	6, 7
Pruitt v. *Cheney*, 963 F.2d 1160 (9th Cir.), cert. denied, 113 S. Ct. 655 (1992)	4-5, 6, 7
Rich v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984)	5, 6
Rostker v. *Goldberg*, 453 U.S. 57 (1981)	8
Sampson v. *Murray*, 415 U.S. 61 (1974)	8
Steffan v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994)	6
United States v. *Harris*, 8 M.J. 52 (CMA 1979)	3
Woodward v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990)	6

Constitution, statutes and regulation:	Page
U.S. Const.:	
Art. I, § 9, Cl. 3 (Bill of Attainder Clause) ...	4
Amend. I	4
Amend. V.....	4
Uniform Code of Military Justice:	
10 U.S.C. 654	2
10 U.S.C. 654(a)	8
10 U.S.C. 654(b)	9
10 U.S.C. 654(b)(1)	8, 9
10 U.S.C. 654(f)(3)	9
10 U.S.C. 925	3, 7
Army Regulation 635-100 (1992)	2, 3
§ XIV ¶ 5-51*a*	2, 9
Glossary	3, 9
Miscellaneous:	
R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th ed. 1993)	8

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-230

JOYCE L. WALMER, PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30a-43a) is reported at 52 F.3d 851. The opinion of the district court (Pet. App. 2a-28a) is reported at 835 F. Supp. 1307.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on April 4, 1995. A petition for rehearing was denied on April 25, 1995. Pet. App. 43a-44a. The petition for a writ of certiorari was filed on July 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1992, petitioner was a major in the United States Army stationed at Fort Leavenworth, Kansas. At that time, a civilian woman told the Army that she and petitioner had had a homosexual relationship while petitioner was in the Army. Pet. App. 3a. After investigating that allegation, the Army began proceedings to discharge petitioner under Army Regulation (AR) 635-100 for engaging in homosexual acts. *Id.* at 3a-4a.[1] The version of AR 635-100 then in effect required separation of any officer who "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," subject to exceptions that petitioner stipulated (*id.* at 5a) do not apply in this case.[2]

---

[1] After the administrative proceedings ended in this case, Congress enacted the current policy regarding military service by homosexuals. See 10 U.S.C. 654. As petitioner concedes (Pet. 14), the current policy is not at issue in this case.

[2] AR 635-100 § XIV ¶ 5-51*a* provided in pertinent part that "[a]n officer shall be separated" if he or she "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that—

> (1) Such conduct is a departure from the officer's usual and customary behavior.
>
> (2) Such conduct under all circumstances is unlikely to recur because it was solely the result of immaturity, intoxication, coercion, or a desire to avoid military service.
>
> (3) Such conduct was not accomplished by use of force, coercion, or intimidation by the officer during a period of military service.
>
> (4) Under the particular circumstances of the case, the officer's continued presence in the service as an officer of

Petitioner elected to appear at a hearing before an Army Board of Inquiry, where she was represented by both military and civilian counsel. Pet. App. 5a. At the hearing, the government introduced a stipulation of fact signed by petitioner, her counsel, and government counsel. *Ibid.* In it, petitioner "admit[ted] that she has in the past engaged in homosexual acts with" the woman who reported their relationship. *Ibid.* Before admitting the stipulation into evidence, the Board determined that petitioner had read and discussed the stipulation with her counsel before signing it and that she wished to enter into it. *Id.* at 6a. The government also introduced an exhibit describing the expected testimony of the woman who had reported having a homosexual relationship with petitioner. Admin. Rec. 55. In that exhibit, the parties stipulated (*ibid.*) that the woman would have testified that she and petitioner had, over an extended period of time, engaged in homosexual acts, including acts that constitute criminal sodomy under the Uniform Code of Military Justice (see 10 U.S.C. 925; *United States* v. *Harris*, 8 M.J. 52 (CMA 1979)). Petitioner stated at the hearing that "she had read and discussed [this exhibit] with her counsel, that she agreed with the content of [the] exhibit and that she agreed to the admission and use of the stipulations [in

---

the Army is consistent with the interest of the Army in proper discipline, good order, and morale.

(5) The officer does not desire to engage in or intend to engage in homosexual acts."

Pet. App. 6a-7a. The term "[h]omosexual acts" was defined as "[b]odily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." AR 635-100, Glossary.

the exhibit] by the board." Admin. Rec. 35-36. The Board admitted the exhibit. *Id.* at 36.

Based upon the record, the Board found that petitioner had engaged in homosexual acts, and it recommended that she be honorably discharged. Pet. App. 1a-2a. That recommendation was approved by an Army Board of Review and by the Office of the Secretary of the Army. *Id.* at 8a-9a.

2. On the date scheduled for her discharge, petitioner filed this action in the United States District Court for the District of Kansas, seeking to enjoin her discharge on the ground, *inter alia*, that it violated the equal protection component of the Fifth Amendment. Pet. App. 9a.[3] The district court entered a temporary restraining order, which was extended with the consent of the parties, requiring the retention of petitioner on active duty.

The district court later denied petitioner's motion for a preliminary injunction on the ground that she was unlikely to succeed on the merits of her challenge to the discharge. Pet. App. 2a-28a. Petitioner had urged the court to review her equal protection challenge under the "active" rational-basis test articulated in *Pruitt* v. *Cheney*, 963 F.2d 1160, 1165 (9th Cir.), cert. denied, 113 S. Ct. 655 (1992). Pet. App. 15a-17a. The government argued for the rational-basis standard enunciated in *Heller* v. *Doe*,

---

[3] Petitioner also alleged that her discharge violated the Administrative Procedure Act, the Bill of Attainder Clause, and the First Amendment. In moving for a preliminary injunction, she relied only on her equal protection and bill-of-attainder claims. Pet. App. 9a, 34a-35a. The courts below rejected both claims. *Id.* at 22a-27a, 40a-42a. In this Court, petitioner raises only the equal protection claim.

113 S. Ct. 2637 (1993). Pet. App. 17a-18a. The district court held (*id.* 20a-21a) that, "under either test," petitioner's equal protection claim was foreclosed by the Tenth Circuit's decision in *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (1984). The court explained that the Tenth Circuit in *Rich* had "held that even if heightened scrutiny were required, the [former military] regulations [governing the service of homosexuals] * * * were nonetheless valid in that they satisfied a compelling governmental interest in maintaining the discipline and morale of the armed forces." Pet. App. 20a.

3. Tne court of appeals affirmed the denial of petitioner's motion for a preliminary injunction. Pet. App. 30a-43a. It held that, in light of *Rich*, petitioner had not shown that she was likely to succeed on the merits of her equal protection claim, or even that there were "serious, substantial, difficult and doubtful" questions on the merits of that claim. *Id.* at 37a-40a.[4]

ARGUMENT

The courts below correctly held that petitioner has not shown a likelihood of success on her equal protection challenge to her discharge from the Army for engaging in homosexual acts. That holding does not conflict with any decision of this Court, and it accords with the decisions of the four other courts of appeals that have reviewed equal protection challenges in this setting. Two additional factors counsel against further review: This case is in an interlocutory posture,

---

[4] On September 25, 1995, Justice Breyer denied petitioner's application for a stay of her discharge.

and it concerns the former, not the current, policy regarding military service by homosexuals.

1. The decision below accords with those of the four other circuits that have reviewed, and uniformly rejected, equal protection challenges to the former military policy. *Steffan* v. *Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc); *Meinhold* v. *Department of Defense*, 34 F.3d 1469, 1477-1478 (9th Cir. 1994); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 461 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Dronenburg* v. *Zech*, 741 F.2d 1388, 1397, 1398 (D.C. Cir. 1984). Those courts agree, moreover, that the standard of review applicable in the special military context is the rational-basis test. *Steffan* v. *Perry*, 41 F.3d at 684 n.3; *Meinhold* v. *Department of Defense*, 34 F.3d at 1478; *Ben-Shalom* v. *Marsh*, 881 F.2d at 464; *Woodward* v. *United States*, 871 F.2d at 1076; *Dronenburg* v. *Zech*, 741 F.2d at 1398.

Petitioner argues (Pet. 20-21) that the Ninth Circuit has applied a more stringent rational-basis test than did the Tenth Circuit in *Rich* and this case. Petitioner bases that argument on the Ninth Circuit's decision in *Pruitt* v. *Cheney*, 963 F.2d 1160, cert. denied, 113 S. Ct. 655 (1992), which enunciated an "active" rational-basis test. Petitioner's argument is incorrect. The Tenth Circuit in *Rich* held that the former military policy survived an equal protection challenge "even if heightened scrutiny were required." 735 F.2d at 1229. The Tenth Circuit reiterated that holding in this case. Pet. App. 39a; see also *id.* at 20a-21a (district court decision). Thus, the Tenth Circuit has made clear that, even under the

more stringent standard of equal protection review enunciated in *Pruitt*, it would uphold discharges in circumstances such as those presented here. Thus, petitioner cannot establish a conflict between the judgment below and the Ninth Circuit's decision in *Pruitt*.

Moreover, *Pruitt* conflicts with this Court's later decision in *Heller* v. *Doe*, 113 S. Ct. 2637 (1993).[5] And, significantly, the most recent Ninth Circuit decision reviewing a discharge under the former policy correctly applied the rational-basis test set forth in *Heller*, not the test set forth in *Pruitt*. See *Meinhold* v. *Department of Defense*, 34 F.3d at 1478. Thus, it does not appear that *Pruitt* represents the law of the Ninth Circuit.

The courts below were correct in holding that petitioner failed to demonstrate a likelihood of success in challenging her discharge on equal protection grounds. Petitioner stipulated to engaging in homosexual acts, including acts that constitute criminal sodomy under 10 U.S.C. 925. See pp. 3-4, *supra*. Petitioner does not challenge the validity of the criminal statute proscribing sodomy. Thus, the present record would have provided a valid basis for

---

[5] *Pruitt* held that "the government [had the burden] to establish on the record that its policy has a rational basis." 963 F.2d at 1166. In contrast, this Court in *Heller* held that under rational-basis review, the government "has no obligation to produce evidence to sustain the rationality" of the classification. 113 S. Ct. at 2643. *Pruitt* relied upon *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), as imposing a more rigorous "active" standard. 963 F.2d at 1165-1166. *Heller*, however, makes clear that *Cleburne* did not "purport to apply a different standard of rational-basis" review. 113 S. Ct. at 2643.

prosecuting petitioner under a provision the validity of which she does not dispute. *A fortiori*, it furnished a rational basis for her discharge.[6]

2. The interlocutory posture of this case also weighs against further review. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 4.18 (7th ed. 1993). The courts below held that petitioner was unlikely to succeed on the merits of her equal protection claim. Thus, neither the merits of that claim nor the standard under which it should be reviewed is squarely presented by the current petition. Rather, the only question that can properly be presented concerns the application of the likelihood-of-success standard on the present record. That case-specific question does not merit this Court's review.

3. Finally, the prospective importance of the decision below is reduced because this case arises under the military's former policy regarding military service by homosexuals. To be sure, the present statutory policy generally continues the former regulatory policy mandating discharge for homosexual acts.[7] The text of the present statute,

---

[6] Moreover, petitioner cannot meet the other requirements for a preliminary injunction. She cannot show that such an injunction is necessary to avoid irreparable injury (see *Sampson* v. *Murray*, 415 U.S. 61, 92 n.68 (1974)); that it would not harm the military's interest; and that it would be in the public interest. See 10 U.S.C. 654(a), 654(b)(1); *Goldman* v. *Weinberger*, 475 U.S. 503, 507-509 (1986); *Rostker* v. *Goldberg*, 453 U.S. 57, 65-66 (1981).

[7] The present policy provides:

however, is not identical to that of the former regulation (compare 10 U.S.C. 654(b)(1) (n.7, *supra*) with AR 635-100 § XIV ¶ 5-51*a* (n.2, *supra*)), and the language of the two policies differs in other respects, such as in the definition of "homosexual act" (compare 10 U.S.C. 654(f)(3) with AR 635-100, Glossary (n.2, *supra*)).

A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

10 U.S.C. 654(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

OCTOBER 1995